

Global Foreign Direct Investment

Portugal

The Portuguese rules on foreign direct investment are governed by Decree-Law no. 138/2014 (FDI Law). According to the FDI Law, the Portuguese Government may exceptionally oppose investments by person(s) from outside the European Union or the European Economic Area, that direct or indirectly allow direct or indirect control over strategic assets. The notion of direct or indirect control under the FDI Law is identical to that determination under EU and Portuguese competition law.

Definition of strategic assets

Strategic assets are defined as (i) key infrastructure assets and (ii) assets related to defense and national security; or (iii) assets related to the provision of essential services in the energy, transport or communications sectors.

No mandatory notification

Note that there is no mandatory notification procedure under the FDI Law.

Request for confirmation that an opposition decision will not be adopted

A purchaser of the assets referred to above may request confirmation that an opposition decision will not be adopted regarding the proposed acquisition of the relevant assets. This request would be made to the Government department responsible for the asset in question, e.g. if the asset in question relates to defence, the notification should be made to the Ministry of Defence, etc.

Tacit confirmation of non-opposition to a transaction absent a Government investigation

If the Government does not initiate an assessment procedure within 30 days from the date of the request, confirmation that a decision to oppose the transaction will not be adopted is deemed to have been tacitly granted.

Government investigation absent a confirmation request

If no confirmation is requested by the prospective purchaser, a review of the transaction in question can be initiated by the Government ex officio within 30 days from the conclusion of the transaction or from the date it becomes publicly known. This review would be initiated by way of a proposal of the relevant Government Department to the Council of Ministers. The transaction can be opposed by the Government if the transaction risks, in a real and sufficiently serious manner, defence and national security and/or the security of supply of services which are fundamental for the national interest.

Criteria for the assessment of the transaction risks

The following criteria are considered in the assessment of the test set out above:

- The physical security and integrity of strategic assets;
- The permanent availability and operability of strategic assets, as well as their capacity for the timely fulfilment of obligations, in particular public services;
- The continuity, regularity and quality of services of general interest provided by people who control strategic assets;
- The preservation of the confidentiality, imposed by law or public contract, of the data and information obtained in the exercise of its activity by the people who control the strategic assets and the technology necessary for the management of the strategic assets.

Transactions susceptible of risking the national defence and security and/or the security of supply of services

A transaction is considered to risk, in a real and sufficiently serious manner, defence and national security and/or the security of supply of services which are fundamental for the national interest according to the criteria listed above within the meaning of the FDI Law when:

- There are serious indications, based on objective elements, of links between the purchaser and third countries which:
 - do not recognize or respect the fundamental principles of the democratic rule of law;
 - pose a risk to the international community as a result of the nature of its alliances;
 - have links with criminal or terrorist organisations or persons linked to such organisations, taking into account the official positions of the European Union on these matters, if any.
- The purchaser:
 - has in the past used the position of control held over other assets to create serious difficulties in the regular provision of essential public services in the country in which they were located or in neighbouring countries;
 - does not guarantee the main allocation of assets, as well as their reversion at the end of the corresponding concessions, where they exist, particularly in view of the absence of appropriate contractual provisions to that effect;
- The operations in question result in a change in the destination of strategic assets when they threaten the permanent availability and operability of assets for the timely fulfilment of applicable obligations, in particular, public service obligations.

Disclosure of evidence for the purposes of an FDI assessment

Once the assessment procedure is initiated by the Government, the purchaser will be required to disclose the relevant information and documentation related to the transaction. The FDI law does not state the precise documentation that would need to be provided to this effect. However, a purchaser should expect to be required to provide (i) full disclosure regarding the foreign investor at issue, including the respective ultimate beneficial owners and (ii) information regarding the purposes of the investment and the future plans for the company being acquired.

Deadline for an FDI decision

Once the assessment procedure is initiated, the Government has **60 days to adopt a decision on whether to approve or prohibit the transaction on FDI grounds**. This deadline begins to run **from the date the Government has received all the information it considers relevant to its FDI assessment**. If no decision is issued within that deadline, a non-opposition decision is deemed to have been adopted.

Effects of a prohibition decision

If a transaction is blocked, all contracts and legal acts related to the transaction are null and void. A prohibition decision is subject to judicial review by the courts. To date, **we are not aware of any transaction being blocked under the FDI Law**.